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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF ARIZONA

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11 United States of America, ) CR -15-01713-TUC- RCC(LAB)  
12 Plaintiff, ) **REPORT AND RECOMMENDATION**  
13 vs. )  
14 Mel Shriner Carter, )  
15 Defendant. )  
16 \_\_\_\_\_ )  
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18 The District Court referred this case to the Magistrate Judge for a hearing on the  
19 defendant's Motion to Dismiss Count 2 as multiplicitous. The defendant, Mel Shriner  
20 Carter, argues that the indictment (Doc. 16) is multiplicitous because it charges two counts  
21 for a single offense and raises double jeopardy questions because it produces two penalties  
22 for one crime. (Doc. 69). The Court concludes the indictment is not multiplicitous and  
23 Count Two should not be dismissed.

24 A hearing was held on 10/13/16. No witnesses testified. No exhibits were introduced.

25 **Charge:**

26 The defendant is charged by indictment with two counts of transportation of illegal  
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1 aliens for profit, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(ii) and 1324(a)(1)(B)(i). Count  
2 One names Epiganio Nape-Santiago and Count Two names Marcos Torres-Rodriguez, as  
3 the transported aliens.

4 **Discussion:**

5 Although no testimony was presented, the indictment charges that on 8/27/16, near  
6 Tombstone, Arizona, Mel Shriner Carter drove a vehicle that contained Epiganio  
7 Nape-Santiago, named in Count One, and Marcos Torres-Rodriguez, named in Count Two.

8 The defendant argues that the government has violated his Fifth Amendment right to  
9 due process, the Double Jeopardy Clause, and Fed.R.Crim.P. 8(a), by charging him with  
10 two counts of transportation of illegal aliens for profit, where the only difference between  
11 the two counts is the name of the person transported. Carter claims that by charging him  
12 in two separate counts the government has two chances to prove the same offense. In his  
13 reply, Carter clarifies that when a single statutory violation is charged, the analysis turns on  
14 whether there was a single act or multiple transactions. (Doc. 78).

15 The government responds that an indictment is only multiplicitous when it charges  
16 multiple counts for a single offense which would produce two penalties for one crime,  
17 raising a question of double jeopardy, citing *U.S. v. Vargas-Castillo*, 329 F.3d 715, 718-19  
18 (9<sup>th</sup> Cir. 2003). (Doc. 75). Both parties cite cases that stand for the proposition that the  
19 test for multiplicity is whether “each separately violated statutory provision requires proof  
20 of an additional fact which the other does not.” *U.S. v. Stewart*, 420 F.3d 1007, 1012 (9<sup>th</sup>  
21 Cir. 2005; *U.S. v. McKittrick*, 142 F.3d 1170 (9<sup>th</sup> Cir. 1998).

22 Each party cites *U.S. v. Zalapa*, 509 F.3d 1060 (9<sup>th</sup> Cir. 2007). In *Zalapa*, the Court  
23 held that the indictment was multiplicitous where a defendant was charged under the same  
24 statute in two separate counts with possession of a single unregistered firearm. The  
25 defendant relies on the case to support its argument that a defendant should not be punished  
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1 twice for a single event, like transporting two undocumented aliens at the same time in the  
2 present case. The government claims *Zalapa* is distinguishable because in that case the  
3 two charges pertained to one firearm and in the present case each charge names a separate  
4 undocumented alien.

5 The court must determine what unit of prosecution is allowed when a defendant is  
6 convicted of multiple violations of the same statute for a single act or transaction. *U.S. v.*  
7 *Keen*, 104 F.3d 1111, 1118 (9<sup>th</sup> Cir. 1997). The defendant cited *Bell v. U.S.*, 349 U.S. 81,  
8 84 (1955) in his motion and during the hearing, cited the Court to *U.S. v. Jewell*, 827 F.2d  
9 586 (9<sup>th</sup> Cir. 1987) and *U.S. v. Hurt*, 795 F.2d 765 (9<sup>th</sup> Cir. 1986), to support his argument  
10 that the act of transportation is the unit of conduct to be charged, not the number of  
11 undocumented aliens transported.

12 In discussing the Mann Act, the Supreme Court in *Bell* held that “If Congress does not  
13 fix the punishment for a federal offense clearly and without ambiguity, doubt will be  
14 resolved against turning a single transaction into multiple offenses...”. In *Jewell*, the  
15 Ninth Circuit held that the indictment was multiplicitous where the defendant was charged  
16 in 13 counts, one for each time he signed an invoice for payment to his company, instead of  
17 being charged once for the one contract as to which there was a conflict of interest. The  
18 Ninth Circuit, in *Hurt*, decided that when the defendant ordered three obscene movies,  
19 mailed to him in several packages, the statute’s uncertainty regarding punishment required  
20 holding that sending one order is a single offense.

21 Those cases, however, are inapposite in the current case because the charging statute is  
22 not ambiguous regarding the unit of prosecution or the punishment. Title 8 U.S.C. §§  
23 1324(a)(1)(A)(ii) and 1324(a)(1)(B)(i) state that any person who is in knowing or reckless  
24 disregard of the fact that an alien is in the United States in violation of the law and who  
25 transports the alien within the United States, shall **for each alien** (emphasis added) be  
26 fined and imprisoned for not more than 5 years.

